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No. 84-1217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STERLING DRUG, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

REPLY TO BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION TO CERTIORARI

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Respondent Federal Trade Commission (FTC) has failed to meet the Petition on the merits. The Opposition's evasion of the issues and its critical errors in describing the record and prior decisions demonstrate that review by this Court is called for. Three points warrant brief reply.

1. The First Amendment

The FTC argues that there is no First Amendment question because the Bayer ads were found "to be false and deceptive because unsupported by the requi-

site level of scientific proof" (Br. Opp. 5-6). This circular argument not only begs the question but underscores the importance of the commercial speech issues presented by this case.

The issue we raise is whether the First Amendment *permits* the Commission to make such a finding of deception when, as here, there is a genuine scientific controversy about what constitutes the "requisite level of scientific proof." The Commission arrived at its conclusion as to the lack of substantiation only by refusing to look at Sterling's scientific evidence or at anything other than clinical testing. Pet. 4, 12-13. But the utility of nonclinical evidence was (and is) a subject of genuine controversy among the experts. Unless the FTC is to be allowed to resolve scientific controversies, there was more than a reasonable basis for petitioner's view that nonclinical evidence of the type here presented can and should be used for the special purpose of making therapeutic judgments among different brands of the same drug and dosage form, i.e., 5-grain aspirin tablets. Pet. 12-13, 15. We are asking this Court to make clear that the Commission is *not* empowered to resolve scientific controversies. As the Seventh Circuit has recognized, government prohibition of ads which "espouse one side of a genuine controversy" would unlawfully impinge on the First Amendment protection of commercial speech. *FTC* v. *National Commission on Egg Nutrition*, 517 F.2d 485, 489-90 (7th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976); Pet. 13-15.

Respondent's citation (Br. Opp. 7) of *National Commission on Egg Nutrition* v. *FTC*, 570 F.2d 157, 160-

61, 163 (7th Cir. 1977), *cert. denied,* 439 U.S. 821 (1978), is untenable. The Seventh Circuit did *not* uphold the FTC's authority to determine the requisite level of substantiation in an area of scientific controversy. On the contrary, the court of appeals held that it (and the agency) did not have to resolve any scientific dispute but only had to find that a scientific controversy existed. 570 F.2d at 161. This was decisive in *Egg Nutrition* because the misrepresentation lay in the advertiser's categorical statement that "there is no scientific evidence" on the other side of the issue—namely, the relation of egg consumption to heart and circulatory diseases. 570 F.2d at 159, 163.

In contrast, Sterling made no unsupportable denial of conflicting scientific evidence as in *Egg Nutrition,* but made representations only about its own product and its comparative tests for pharmaceutical characteristics and quality. It was entitled to defend such commercial speech by showing highly reputable scientific support for the alleged claims (Pet. 12-13), notwithstanding the existence of a contrary opinion. This is inherent in the role of advertising in "the marketplace of ideas" under constitutional principles. Pet. 13-14.

2. The Chenery Rule

Respondent seeks to evade the impact of *SEC* v. *Chenery Corp.,* 332 U.S. 194 (1947), by arguing that the FTC found that petitioner was guilty of "deliberate" violations or, as an ingenious fallback position, that the findings actually made by the FTC "lead inexorably" to such conclusion (Br. Opp. 3-4). This is simply not so.

On the crucial issues of alleged Bayer claims of therapeutic and pharmaceutical superiority, the FTC opinion did not find improper intent by petitioner or even discuss the subject, whether directly, indirectly, inferentially or otherwise (Pet. 9, 11). The same is true of the tension relief claims relevant to the Order's "reasonable basis" requirement (Pet. 10). The reason for the absence of any such finding is simple: the record does not allow it. In the absence of such a finding, and because of the brief period involved and other factors, we urged below that the record did not support the imposition of broad multi-product injunctive provisions.

The Ninth Circuit's impermissible solution was to arrogate to itself the discretion to determine facts (contrary to the record) and to seek to justify the agency order on that basis. This violated the fundamental rule that the propriety of agency action must be judged "solely by the grounds invoked by the agency." (*Chenery,* 332 U.S. at 196; Pet. 8).

Respondent cites two cases in an effort to limit or distinguish the *Chenery* rule (Br. Opp. 4, n.8), but both are inapplicable. In *Penn-Central Merger and N&W Inclusion Cases,* 389 U.S. 486, 526-27 n.14 (1968), this Court found that the lower court had upheld the agency *on the agency's own grounds* before adding comments about several additional factors. In *Time, Inc.* v. *U.S. Postal Service,* 667 F.2d 329, 335 (2d Cir. 1981), the court of appeals found that the agency's public interest finding was the determinative factor regardless of the particular statutory clause applicable. In contrast, here the court below did not sustain the agency on its own grounds, but on several crucial issues entered an area reserved for agency

decision. The court clearly erred by "substituting what it considers to be a more adequate or proper basis" for the order under review. *Chenery,* 332 U.S. at 196-97.

3. Lack of Basis For Broad Multi-product Order

The Opposition also has failed to deal in any substantive fashion with our showing that there was not substantial evidence in the "whole record" to support the Commission's findings of violation and the entry of the same multi-product relief against Sterling as was imposed against Bristol-Myers Co. and American Home Products Corp. Pet. 18-24. Respondent, instead, has relied on assertions that the court "made a fair assessment of the record as a whole . . ." and that the Commission, as an "expert body," has "wide discretion in choosing an appropriate remedy." (Br. Opp. 7, 8). These vague statements simply do not address the shortcomings of the Ninth Circuit's review in this case.

Nor do the cases relied on by respondent support the proposition that the Commission is authorized to "avoid disparate treatment" among competitors where, as here, petitioner's conduct and history of violations were markedly different from those of its competitors. Pet. 22-24. Thus, in *Encyclopaedia Britannica, Inc.* v. *FTC,* 605 F.2d 964, 974 (7th Cir. 1979), *cert. denied,* 445 U.S. 934 (1980), the court upheld an order that was "virtually identical" to the order the FTC imposed in *Grolier* "after a finding that Grolier has been engaging in the same practices as Britannica."[1]

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[1] Later, when the *Grolier* order came up for review, it was affirmed because the FTC had imposed "the same remedy for these

CONCLUSION

The Petition For Writ of Certiorari should be granted.

Respectfully submitted,

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abuses'' in *Encyclopaedia Britannica. Grolier, Inc.* v. *FTC,* 699 F.2d 983, 989 (9th Cir.), *cert. denied,* 464 U.S. 891 (1983). *Ford Motor Co.* v. *FTC,* 547 F.2d 954, 958 (6th Cir. 1976), *cert. denied,* 431 U.S. 915 (1977), on which respondent also relies, also fails to support the argument that the Commission may impose similar relief against competitors even when, as here, there are material differences in the facts.